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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 569

GENERAL FOODS CORPORATION, HUNT FOODS, INC. AND MORTON SALT COMPANY,

Petitioners,

vs.

STATE WHOLESALE GROCERS, ZEIGMUND WHOLESALE GROCERY CO., INC., RALPH C. BERG, D/B/A BERG'S FOOD STORE, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX TO PETITION.

	PAGE
Opinions Below	2
Jurisdictional Grounds	3
Questions Presented	3
Statutes Involved	4
Statement of the Case	5
Reasons for Granting the Writ	8
I. The Rule of Law Laid Down by the Court Below Regarding the Procedural Issue of Burden of Proof Is in Conflict With a Decision of the Court of Appeals for the Second Circuit and Decisions of the Federal Trade Commission	8
II. The Decision of the Court Below Regarding the "Services or Facilities" Issue Is Self-Contradictory and Devoid of Findings of Fact to Support It	11
III. The "Customer" Issue	15
IV. The Issues Involved in the Statutory Phrase "Competing in the Distribution of Such Products"	17
Conclusion	20

INDEX TO APPENDIX.

Opinion of the Court of Appeals 21

Judgment Orders 37

Orders Denying Petitions for Rehearing and Petitions for Rehearing En Banc 40

That Part of the District Court's Opinion Relating to the Section 2 (d) Issue 42

Typical Advertisement of a General Foods Product in *Woman's Day* and Schedule of Other Publications in Which It Appeared 60

Typical Advertisement of a Hunt Foods Product in *Woman's Day* and Schedule of Other Publications in Which It Appeared 62

Typical Advertisement of a Morton Salt Product in *Woman's Day* and Schedule of Other Publications in Which It Appeared 64

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, General Foods Corporation, Hunt Foods, Inc., and Morton Salt Company (hereinafter sometimes referred to as "Defendant Suppliers") pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on July 25, 1958, as amended on September 17, 1958.

The Respondents, being all of the original plaintiffs except for three who withdrew from the case prior to the decision of the District Court, are as follows: State Wholesale Grocers, a corporation; Zeigmund Wholesale Grocery Co., Inc., a corporation; Ralph C. Berg, d/b/a Berg's Food Store; Leo Bernard, d/b/a Leo's Food Mart; Bernard Bruski, d/b/a United Meat Market; Eph Goldstein, d/b/a Goldstein's Progressive Foods; Earl Larson and Warren Larson, co-partners, d/b/a Franklin Grocery and Market; Jack Levin and Harvey Berebitsky, co-partners, d/b/a Harvey's Super Mart; O. V. Makela, d/b/a Makela's Food Store; John L. Malevitis, d/b/a Fruitland Foods; Jack E. Markus, d/b/a Alliance Meat Shop; Carmen Mastri, d/b/a Cicero Lake Food Mart; Steven J. Minarik, d/b/a Norward Park I.G.A.; Henry E. Muir and Hugh A. Muir, co-partners, d/b/a Fifth Avenue Food Mart; Stanley Piekarz, d/b/a Steven's Certified Super Marts; Anthony Racz, d/b/a Save-Way Food Mart; Edw. J. Schuetz, d/b/a Schuetz' I.G.A. Super-Marts; Joseph D. Stone, d/b/a Clover Food Mart; Robert M. Wagner and Elizabeth Wagner, co-partners, d/b/a Wagner Grocery and Market; Atlas Market Company, a corporation; Dominicks Finer Foods, Inc., a corporation, and Carl A. Schletz, Inc., a corporation.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is reported in 258 F. 2d 831 (Adv. Sheet No. 4, November 3, 1958) and is printed in its entirety in the Appendix hereto. The opinion of the District Court, together with its 183 specific Findings of Fact and 18 Conclusions of Law, is reported in 154 F. Supp. 471 and is printed in its entirety in the *Appendix to Appellants' Brief* filed by Respondents in the Court of Appeals, nine copies of which have been filed with this Petition pursuant to Rule 21(4)

of the Rules of this Court. For the convenience of the Court that portion of the opinion of the District Court bearing upon Section 2 (d) of the Robinson-Patman Act is printed in the Appendix hereto.

JURISDICTIONAL GROUNDS.

The judgment order of the Court of Appeals was entered on July 25, 1958 and amended by order entered on September 17, 1958, said orders being printed in the Appendix hereto. A timely petition for rehearing was filed by Defendant Suppliers, and an order denying said petition (with one judge dissenting) was entered on September 23, 1958. On that same date, the Court sitting *en banc* denied (with two judges dissenting) Defendant Suppliers' petition for rehearing *en banc*. The two orders denying said petitions are printed in the Appendix hereto. The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254 (1) and under Title 28 U. S. C., Section 1651.

QUESTIONS PRESENTED.

1. In order to establish a violation of Section 2 (d) of the Robinson-Patman Act, is it incumbent upon the Federal Trade Commission or an individual plaintiff to prove, *inter alia*, that the defendant—

   (a) had at least one other "customer",
   (b) that such other customer was "competing" with the defendant's customer who received payment for a facility promoting certain products,
   (c) that such competition was in "the distribution of such products" (the promoted products), and that
   (d) such other customer was not offered a "proportionally equal" payment;

or are the above statutory elements matters of affirmative defense as to which the burden of proof rests upon the defendant?

2. Is a supplier's payment for an advertisement of a branded product in a leading national magazine, which advertisement aids in the sales of the advertised product in all stores handling such product, a payment for the type of "services or facilities" to which the restrictions of Section 2 (d) apply, if such magazine is published by a subsidiary of a customer and sold only in that customer's stores?

3. Is a retailer a "customer" of a supplier within the meaning of Section 2 (d) if the retailer does not purchase the supplier's product from the supplier?

4. If a supplier paid one of his customers for a facility promoting a *specific* product, does Section 2 (d) require the supplier to offer proportionally equal payment (a) to those of his customers who did not handle that specific product at all, or (b) to those who at some time or times have handled the product but did not handle such product at or about the time of such promotion?

STATUTES INVOLVED.

The statutory provisions involved are Sections 2 (d) and 2 (e) of the Clayton Act, as amended by the Robinson-Patman Act, Title 15 U. S. C., Sections 13 (d) and 13 (e):

> "(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."
>
> "(e) That it shall be unlawful for any person to

discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

STATEMENT OF THE CASE.

Defendant Suppliers are large companies that market various brand-name grocery products and in connection therewith engage extensively in nationally advertising these specific and distinctly identified products in various media. At various times during the period involved the Defendant Suppliers advertised *some* of their branded products in the magazine *Woman's Day*. Woman's Day, Inc. published the magazine *Woman's Day* and it and the defendant, The Great Atlantic and Pacific Tea Company (New Jersey) were wholly owned subsidiaries of The Great Atlantic and Pacific Tea Company, a Maryland corporation.

The magazine *Woman's Day* is a leading national magazine, ranking in circulation and advertising among other magazines of general circulation such as Life, Saturday Evening Post, etc., and of a content and quality comparable to and competitive with Ladies Home Journal, McCall's, Good Housekeeping, etc.

The copy for the advertisements was the same copy which Defendant Suppliers used in other national magazines and newspapers, advertising the branded product itself and making no reference to any store at which the product could be purchased, nor to the price of the product. (See typical advertisements, together with schedule of media used, reprinted in the Appendix hereto.) This advertising was placed in *Woman's Day* on the recommendation of the respective advertising agencies of Defendant Suppliers,

which recommendations were made "solely upon the evaluation by such agencies of *Woman's Day* as an effective advertising medium for the sale of the products of their respective clients to the consumer public." (Opinion of court below, App. p. 21.) The rates paid by advertisers, including Defendant Suppliers, were comparable to and competitive with those charged by magazines of national circulation. With one exception, not material here, *Woman's Day* was distributed only in A & P stores and it was placed in racks attached to the cash registers at check-out counters in the self-service stores.

Plaintiffs are twenty retail grocers and two wholesale grocers in the Chicago Metropolitan area. Pursuant to Section 4 of the Clayton Act, plaintiffs brought suit against the Defendant Suppliers, A & P, and Woman's Day, Inc., claiming that, by virtue of such advertising in *Woman's Day*, Defendant Suppliers had discriminated against them in violation of Sections 2 (a), 2 (d) and 2 (e) of the Robinson-Patman Act, that A & P and Woman's Day, Inc. had violated Section 2 (f) of that statute. The complaint also included claims under Sections 1 and 2 of the Sherman Act, but plaintiffs withdrew such claims by stipulation in the District Court.

The District Court, whose jurisdiction was invoked under the federal anti-trust laws, separated, for purposes of the trial, the issue of liability (which included the issue of "fact of damage" under Section 4 of the Clayton Act) from the question of the amount of damages. The case was tried without a jury with all of the evidence, documentary and otherwise, being stipulated by the parties.

The District Court reasoned that the advertisements of Defendant Suppliers in *Woman's Day* aided in the sale of the advertised products in *all* stores carrying such products and that any benefit to A & P from such advertisements was incidental to that accruing to Defendant Suppliers. Having

thus based its decision of non-violation on this "services or facilities" issue, the District Court did not reach the other issues under Section 2 (d) and 2 (e) of the Robinson-Patman Act, which were raised in the briefs filed before it, namely, whether plaintiffs were "customers" of Defendant Suppliers and, if so, whether they were "competing in the distribution of such products," *i. e.*, those products advertised in *Woman's Day*. Also, since the District Court held that the Robinson-Patman Act was not violated, there was no reason for it to decide the "fact of damage" issue under Section 4 of the Clayton Act or the question of whether a "spurious" class suit was properly brought pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure. (The District Court also held that Sections 2 (a) and 2 (f) were not violated, and the claims under those Sections were abandoned in the Court of Appeals.)

On appeal the court below reversed the District Court as to its holding of non-violation of Section 2 (d) but affirmed it as to its holding on Section 2 (e). Because of the withdrawal of the Sherman Act claims and the abandonment of the claims under Sections 2 (a) and 2 (f), the Court of Appeals affirmed the judgment of the District Court as to the dismissal of A & P and Woman's Day, Inc. (see footnote 5 of opinion of court below, Appendix, p. 23). As to the Defendant Suppliers, the cause was remanded to the District Court for further proceedings (a stay of mandate has been granted).

REASONS FOR GRANTING THE WRIT.

I.

The Rule of Law Laid Down by the Court Below Regarding the Procedural Issue of Burden of Proof Is in Conflict With a Decision of the Court of Appeals for the Second Circuit and Decisions of the Federal Trade Commission.

The rule laid down by the court below regarding burden of proof, if followed, would upset the procedural law applicable to every case involving Section 2 (d) or 2 (e) of the Robinson-Patman Act, whether brought by a private person or by the Federal Trade Commission. This statement of law was made in connection with the court's decision that Section 2(d) was violated by the Defendant Suppliers, the court stating that the advertising payments to Woman's Day, Inc., were unlawful—

> "unless such payment or consideration was available on proportionally equal terms to all other customers competing in the distribution of such products."

Immediately following the above paraphrase of the "unless" clause of the statute the court construed it as follows:

> "*In effect, Section 2 (d) declares as a general rule what is unlawful and, by way of exception to the rule (not as a condition thereof), provides for an escape from its applicability.* The burden is upon the party who seeks the protection of the exception, to prove that it applies to the presented facts. (Cases cited.) This language required defendant suppliers to prove in the district court that the payments for advertising or alternative appropriate benefits were available on proportionately equal terms to all customers competing with A & P in the distribution of

their said products. This they failed to do." (Emphasis added.)

Under this statement of the law on burden of proof, three important statutory elements would be matters of affirmative defense rather than elements of the plaintiff's burden of proof under Section 2 (d) of the Act. If the rule of law is correct, the Commission or private litigant could establish a *prima facie* violation simply by proving that a defendant made payments to a customer for a promotional facility. To *disprove* the fact of violation, a defendant would then have the burden of proving (1) that not one other person who handled his product (perhaps numbering in the thousands) was his "customer", or, (2) if any was his "customer", that such person was not competing with the customer who received such payment in the distribution of the advertised product at or about the time of such payment or (3) that such person was offered proportionally equal payments from the defendant. The court below thus places these statutory elements in the same category as matters of justification under Section 2 (b), *i. e.*, the affirmative defenses of cost justification and meeting competition. See *Simplicity Pattern Co., Inc.* v. *Federal Trade Commission*, 258 F. 2d 673 (Adv. Sheet No. 3, Oct. 27, 1958), (D. C. Cir.), 1958 Trade Cases, Par. 69,047. This case involves an interpretation of Section 2 (e), and is now before this Court, certiorari having been granted on both the petition and cross-petition on November 24, 1958.

The decision of the Court of Appeals in the instant case is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365 (Adv. Sheet No. 2, Oct. 20, 1958), 1958 Trade Cases, Par. 69,099, on this burden of proof doctrine. In the *Atalanta* case the court said at page 369:

> "Counsel for the Commission argue that all the Commission need show is that a supplier in the general course of his business has given a promotional allowance to one customer *and not to others;* but as pointed out, *supra,* the existence of another *competing* purchaser of *a product of like grade and quality* must also be shown and proof thereof *is an essential part of the Commission's case.* (*Corn Products Refining Co.* v. *F. T. C.* (1944-45 Trade Cases, Par. 57,263), 7 Cir., 1944, 144 F. 2d 211, 219, aff'd. 324 U. S. 726." (Emphasis added.)

The opinion in the *Simplicity Pattern* case shows that the Federal Trade Commission has acknowledged that, in a Section 2 (d) case, it has the burden of proving the defendant's failure to make proportionally equal payments. In that case the court pointed out, 258 F. 2d at 677, that the Commission had adopted the decision of the hearing examiner who had said:

> "True, there is no showing of competitive injury. But this, as the examiner understands, is not required in a proceeding under Section 2 (e). Given the element of jurisdiction, it appears that a prima facie case is established when it is shown that a seller is supplying to one customer facilities for use in the resale of the seller's products, *and not supplying such facilities to the competitor of the favored customer on proportionally equal terms."* (Emphasis added.)

To the knowledge of Petitioners, no court has ever before enunciated, nor any court or commentator suggested (and, indeed, it was not so contended by the plaintiffs in the instant case) that the above three elements of Section 2 (d) were matters of affirmative defense. It is not surprising that there are so few cases on this specific issue because even a cursory analysis of the statute compels the conclusion that this burden of proof rests upon the plaintiff. It is obvious that Section 2 (d), as well as 2 (e), is directed, not against a supplier's payment to a customer for promo-

tional facilities, but rather against *discrimination;* it is equally clear that discrimination entails a *difference in treatment between two or more customers.* A *prima facie* case of discrimination under Section 2 (d), therefore, must include more than proof that *one* customer received payment from the defendant for services or facilities furnished by or through the customer in connection with the sale of a product; it must also include proof that *at least one other customer* of that defendant, competing in the sale of *that* product at or about the time of the promotion was not offered proportionally equal payments. As said by the Court of Appeals in *Simplicity Pattern:* "We may assume that had the facilities been available to the fabric stores on 'proportionally' equal terms, *there could be no discrimination* within the meaning of the section." (258 F. 2d 673, 678; emphasis added.) In other words, the "unless" clause of Section 2 (d) cannot operate as an *exception* to the discrimination proscribed therein (as stated by the court below), because failure to make proportionally equal payments to customers competing in the distribution of such product is a *sine qua non* of the discrimination proscribed.

II.

The Decision of the Court Below Regarding the "Services or Facilities" Issue Is Self-Contradictory and Devoid of Findings of Fact to Support It.

The District Court found at the outset that Defendant Suppliers' bona fide payments for their advertisements in *Woman's Day* did not contribute to the furnishing of the magazine itself and that the advertisements, and not the magazine, were thus the focal point of the case. Having so found, the District Court proceeded to analyze the advertisements, together with the manner of sale of the magazine and the shopping habits of grocery shoppers, in

order to determine whether they were the kind of "services or facilities" to which the restrictions of Section 2 (d) applied. The court answered this question in the negative, because it found that such advertisements did, *in fact*, aid in the sales of the advertised products in *all* stores that carried the products and that any benefit to A & P from such advertisements was incidental to that accruing to Defendant Suppliers. Since the advertisements were, therefore, inherently non-discriminatory, the District Court held that the Defendant Suppliers' advertising payments to Woman's Day, Inc., did not violate Section 2 (d). For the convenience of the Court, that portion of the District Court opinion dealing with Section 2 (d) is printed in the Appendix hereto. (As noted above, the full opinion is printed in the Appendix to Appellants' Brief nine copies of which have been filed herewith.)

The Court of Appeals found that "The service or facility involved in this case is the publication *Woman's Day*," but agreed with the District Court that payment for the advertisements in *Woman's Day* did not constitute a furnishing, or even a contribution to the furnishing, of the publication itself. Expressly rejected by the Court of Appeals was the plaintiffs' argument that, since the advertising payments defray part of the cost of the magazine, such payments are tantamount to payment for the magazine itself. The Court of Appeals' finding on this issue was definite and succinct (Appendix, p. 31):

> "In short, defendant suppliers were simply buying an advertisement from Woman's Day, Inc. They were dealing at arms' length. They paid for the advertisement which they bought."

Having agreed with the District Court that the Defendant Suppliers paid only for their advertisements and not for the magazine, it would seem obvious that, before the Court of Appeals could properly reverse the District Court as to Section 2 (d), it must find, contrary to the

finding of the District Court, that such advertisements were discriminatory. The fact is that the opinion of the Court of Appeals is completely silent as to the nature or effects of the Defendant Suppliers' advertisements in *Woman's Day*, and there is no indication whatever that the court below was in disagreement with the District Court's finding that such advertisements aided all grocers who carried the advertised products and that any benefit to A & P from such advertisements was incidental to that accruing to Defendant Suppliers. Thus the holding of the court below that Section 2-(d) was violated stands completely devoid of essential factual support.

Not only is the decision of the Court of Appeals lacking in essential factual support, but it is also self-contradictory. The contradiction occurs between the court's finding that (1) Defendant Suppliers did *not* pay for *Woman's Day*, and its implicit finding that (2) Defendant Suppliers *did* pay for *Woman's Day*. The first finding is necessarily implied from the court's statement (Appendix, p. 29) that the Defendants' payments to Woman's Day, Inc. did not even contribute to the furnishing of *Woman's Day*. ("In short; Defendant Suppliers were simply buying an advertisement from Woman's Day, Inc."—Appendix, p. 31.) The second finding is implicit in the court's decision, because the language of the statute held to be violated ("It shall be unlawful * * * to pay * * * for any service or facilities * * *") makes it a prerequisite to violation that the Defendant shall have paid for the facility involved in the case, and the court expressly found that "The service or facility involved in this case is the publication, Woman's Day." (Appendix, p. 29.) Thus it is seen that, upon analysis, the opinion of the court below contains two findings of *fact* that are completely contradictory one to the other. The entire decision of the court is thus rendered self-contradictory.

Silhouetting the fact that the opinion of the court be-

low is self-contradictory and stands without essential factual support is the court's complete ignoring of the primary issue argued before it, the issue to which the major portion of the District Court's memorandum was devoted, namely, what kind of "facilities" are covered by Sections 2 (d) and 2 (e) of the Robinson-Patman Act. None of the three points under Section 2 (d) which were discussed by the Court of Appeals (materiality of intent, burden of proof, and the requirements of satisfying the proportionality test) were the basis of the District Court's decision, and the holdings on such issues cannot logically alter the decision of the District Court if that Court was correct on the basic "facilities" question. Stripped of the discussion of the above three tangential issues, the opinion of the court below, in so far as Section 2 (d) is concerned, is contained in but a single sentence setting forth a bare legal conclusion:

> "The defendant suppliers paid, and contracted to pay, money to Woman's Day, Inc., a controlled subsidiary of A & P, for advertising in a magazine furnished by A & P in connection with the sale of products manufactured, sold, or offered for sale by said suppliers. Section 2 (d) made that transaction unlawful * * *"

In their petitions for rehearing Defendants invited the attention of the court to the deficiencies of its decision. However, although Chief Judge Duffy and Judge Finnegan voted in favor of granting a rehearing *en banc*, both the petitions for rehearing and the petitions for rehearing *en banc* were denied without comment. (Judge Finnegan, but not Chief Judge Duffy, sat on the division of the court which heard and decided the case.)

It is respectfully submitted that the "services and facilities" issue presents a question of paramount importance under Sections 2 (d) and 2 (e) and should be resolved by this Court. It is further submitted that the contradictory nature of the opinion is such that it calls for an exercise of this Court's power of supervision.

III.

The "Customer" Issue.

The record in the instant case shows affirmatively that none of the plaintiff retailers (with the exception of some who purchased Instant Maxwell House Coffee from General Foods Corporation at times during the period involved) purchased any of the Defendant Suppliers' products from the Defendant Suppliers, but such products as were purchased were purchased from a jobber or wholesaler. As noted above, since the District Court found that the advertisements in *Woman's Day* were not the type of facility contemplated by the statute, it was unnecessary for that Court to make any holding with respect to whether a retailer is a "customer" of a supplier within the meaning of Section 2 (d) when he does not purchase the supplier's product from the supplier but obtains it from some other source. And the District Court *did not* pass on that issue.

The Court of Appeals stated in its opinion (Appendix, p. 35) that: "It is elementary that this court, in the exercise of its appellate jurisdiction, will not pass upon any question as to which the District Court, without objection of counsel for any party, failed to make a decision. Upon a remandment to that court, counsel have a right to ask for complete rulings on such a question."

From this statement it would seem that the Court of Appeals did not intend to pass upon the question of the definition of the word "customer" in Section 2 (d) but intended to leave that question for the trial court upon remand. However, the Court of Appeals, despite the fact that no plaintiff retailer bought anything from Hunt or Morton and only some of plaintiff retailers bought anything from General Foods, held that the District Court was "in error in concluding that plaintiffs failed to prove a violation of Section 2 (d) by the defendant suppliers" (Ap-

pendix, p. 34). It appears to follow from that holding that the Court of Appeals decided that all plaintiff retailers were customers of each Defendant Supplier within the meaning of Section 2 (d). Plaintiffs contended vigorously for this interpretation of the court's finding in their answer to the petitions for rehearing (p. 9), and although this ambiguity was pointed out in Defendant Suppliers' petition for rehearing, the petition was denied without comment.

If the Court of Appeals intended to hold, as plaintiffs claim, that the word "customer" in Section 2 (d) included all those who handled a supplier's product, even though they did not purchase it from such supplier, the holding is in conflict with the decision of the Court of Appeals for the Third Circuit in *Klein* v. *Lionel Corp.* (237 F. 2d 13, 1956). Although that case arose under Section 2 (a) of the Act, the issue thereunder is identical inasmuch as both Section 2 (a) and Section 2 (d) have to do with discrimination as between two or more purchasers from the same seller. The Third Circuit held that, even though "fair trade" price control was exercised by the defendant over the plaintiff's resale prices (which was not true in the instant case), the plaintiff, who purchased the defendant's products through a jobber, was not covered by the provisions of the statute (237 F. 2d at 15):

> "Klein did purchase Lionel products but not from Lionel. It follows that the necessary requisite of two purchasers from the same vendor is not met and Klein, therefore, can claim no protection under the Act as a direct purchaser."

In the *Atalanta* case, the court said: "All that the Act requires is that a seller give fair and equal treatment to all those *to whom he elects to sell products* of like grade and quality." (258 F. 2d at 373; emphasis added.)

In Senate Committee Report No. 1502 (74th Cong., 2d Sess., Feb. 3, 1936), it is stated in the analysis of the bill:

"The bill proposed to amend Section 2 of the Clayton Act so as to suppress more effectually discriminations *between customers of the same seller* • • •." (Emphasis added.)

House Committee Report No. 2287 (74th Cong., 2d Sess. March 31, 1936) was to the same effect.

It is submitted that the question of what persons are "purchasers" or "customers" of a supplier for purposes of the Robinson-Patman Act is a recurring question of importance under the federal anti-trust laws and one that should be resolved by this Court.

IV.

The Issues Involved in the Statutory Phrase "Competing in the Distribution of Such Products."

It is possible that the court below did not intend to hold that the burden of proving the non-existence of "• • • other customers competing in the distribution of such products • • •" was upon a defendant, but merely intended to hold that, after the elements inherent in the above statutory phrase are established, the burden of proving proportionally equal payments to such other customers was upon the defendant. While, if this interpretation is correct, it reduces the number of errors in the Court of Appeals' broad statement as to the procedural matter of burden of proof from three errors* to one, it would nevertheless necessarily show a serious conflict in *substantive* law between this Court of Appeals and the Second Circuit. This substantive issue has to do with the questions of whether the competition between a plaintiff and a defendant's "favored" customer must be with respect to the specific products promoted by

* See discussion under I above.

the supplier, and whether such competition must also be at or about the time of such promotion.*

The record failed to show that any plaintiff competed with A & P in the distribution of any Hunt product that was advertised in *Woman's Day*, and, with the exception noted below,** it failed to show that any plaintiff ever competed with A & P in the distribution of any General Foods product that was ever advertised in *Woman's Day*. Much less does the record show that any product of General Foods or Hunt that was advertised in *Woman's Day* was carried by plaintiffs at or about the time that it was so advertised. Thus, as far as the record in this case is concerned, plaintiffs may have been basing their claim of discrimination on the fact that they were handling, for example, Gaines Dog Food (a General Foods product which was never advertised in *Woman's Day*) at the time that General Foods was advertising Birds Eye Frozen Orange Juice in *Woman's Day*—even though plaintiffs may have been carrying a competitor's brand of frozen orange juice rather than Birds Eye during this same period. Therefore, unless the Court of Appeals intended to remand these issues for determination by the District Court, it necessarily follows that the court's reversal of the case as against all Defendant Suppliers constitutes a holding that (1) the word "such" in the statutory phrase "competing in the

* The question here is whether there was competition between a plaintiff retailer and an A & P store with respect to a particular branded product of a Defendant Supplier at or about the time of the advertising of that product in *Woman's Day*. The stipulation of the parties (*Pls.' Appendix, p. 58*) was limited to the fact that each plaintiff's *store* was in competition with an A & P store in the sense that both *stores* were seeking to gain the trade of at least one customer.

** Some plaintiff retailers purchased Instant Maxwell House Coffee from General Foods at some time or times during the period involved, but the record fails to show that any of them were handling it during March 1954, which was the only time during the period involved in this suit that it was advertised in *Woman's Day*.

distribution of *such* products," is meaningless, and (2) that the time of competition with the favored customer need not relate to the time of the defendant's promotion of its product.

This holding is in direct conflict with the Second Circuit in the *Atalanta* case where both of these issues were involved. With respect to the specific product issue, the court there held that the supplier's other customers were not entitled to proportionally equal payments unless they were competing in the distribution of products "of like grade and quality" with those being promoted by the supplier. Expressly rejected by the court was the contention of the Federal Trade Commission that all customers were covered by the statute, the court saying (258 F. 2d at 370):

> "* * * To adopt the Commission's argument would be tantamount to striking out from Section 2 (d) the qualifying phrase 'competing in the distribution of such products or commodities' and overruling the prior decisions holding that 'such products' mean products of like grade and quality."

In that case the court in its opinion also emphasized the importance of the time element, and in footnote 6 (258 F. 2d at 372) said:

> "Prior to the decision under review, the Commission itself recognized that the sales to the unfavored customer must occur within the same approximate time period as the sales to the favored customer. Thus in *Kay Windsor Frocks, Inc.*, 1954, 51 F. T. C. 89, the Commission was careful to demonstrate that a substantial amount of the dress sales to Franklin Simon on which advertising allowances were given actually occurred within the same period as the sales to R. H. Macy & Co., which received no such allowances."

The importance of the specific product issue and the time element issue is such that they should be passed on by this Court.

CONCLUSION.

For each of the foregoing reasons, we earnestly urge that this Petition be granted and that this Court's writ of certiorari issue to the Court of Appeals for the Seventh Circuit to review its decision in the instant case.

Respectfully submitted,

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APPENDIX.

OPINION OF COURT OF APPEALS.

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit.

No. 12178 September Term, 1957 April Session, 1958.

STATE WHOLESALE GROCERS, an Illinois corporation, et al.,
Plaintiffs-Appellants,
v.
THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, a New Jersey corporation, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 25, 1958

As amended September 17, 1958.

(Rehearing denied September 23, 1958.)
(Rehearing *en banc* denied September 23, 1958.)

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* State Wholesale Grocers and Zeigmund Wholesale Grocery Co., Inc., Illinois corporations (hereinafter referred to as plaintiff wholesalers), and a group of individual store retailers of

grocery products and other related products (hereinafter referred to as plaintiff retailers), all engaged in business in the Metropolitan Area of Chicago, Illinois, sued in a class suit[1] in the district court for treble damages and for injunctive relief under the Clayton Act, as amended by the Robinson-Patman Act.[2] The case was tried without a jury upon the issue of liability, the court having for the purposes of trial, separated that issue from the issue of damages. Judgment was entered in favor of defendants and the cause was dismissed. Plaintiffs have appealed. They rely on the district court's alleged error in misconstruing and misapplying said act, primarily §§ 2(d) and 2(e) thereof.[3]

As a result of a commendable cooperation in which the district judge and counsel for all parties joined, all of the evidence, documentary and otherwise, was stipulated, reserving to each party the right to argue the materiality or relevancy thereof.

There is no significant dispute as to the basic facts pertinent to the decision. We are thus not confronted here with the provision of Federal Rules of Civil Procedure, 52 (a), that findings of fact shall not be set aside unless clearly erroneous. *United States* v. *E. I. du Pont & Co.*, 353 U.S. 586, 598, note 28.

The district court made 183 findings of fact and 18 conclusions of law, which are set forth as a part of its published opinion.[4]

While in the district court the issue of liability involved §§ 2(a), 2(d), 2(e) and 2(f) of the Clayton Act, on appeal

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1. Pursuant to 28 U.S.C.A. rule 23.
2. 15 U.S.C.A. §§ 12-27.
3. 15 U.S.C.A. 13 (d) and 13 (e).
4. 154 F. Supp. 471, 485, 506.

plaintiffs in effect have concentrated upon only §§ 2(d) and 2(e). [5]

The facts below set forth are established by the record. They include certain facts, *inter alia*, which we have found contrary to some found by the district court.

Defendant, The Great Atlantic and Pacific Tea Company, a New Jersey corporation, herein referred to as A & P, is a retail chain enterprise operating over 200 stores throughout the Metropolitan Area of Chicago with approximately 126 stores located in that city. It handles grocery products, in varying percentages of its gross sales. There are other retail groceries and wholesale grocers in the Area. Each plaintiff wholesaler sells to independent retail grocery stores which are in competition with A & P.

Defendants General Foods Corporation, Morton Salt Company and Hunt Foods, Inc., are corporate suppliers of grocery products in the United States whose brands of products are nationally known by their names and accepted by the consuming public. They are hereinafter referred to some times as "suppliers" or "defendant suppliers." At all times pertinent herein some of the products of each of the suppliers was handled and sold by the A & P stores, plaintiff retailers, plaintiff wholesalers, and other retail groceries and wholesale grocers in the Area.

Defendant Woman's Day, Inc., is a New York corporation, all of the capital stock of which is held by The Great Atlantic and Pacific Tea Company, a Maryland corporation. [6]

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5. This amounts to an abandonment by plaintiffs of reliance upon §§ 2 (a) and 2 (f). Moreover, by stipulations in the district court, plaintiffs withdrew any claims under the Sherman Act. 15 U.S.C.A. §§ 1 and 2. Therefore, insofar as the foregoing sections are concerned, we are required to affirm the judgment of the district court in favor of defendants A & P and Woman's Day, Inc.

6. Defendant A & P is a wholly owned and controlled subsidiary of the Maryland corporation.

Woman's Day is a magazine published, since 1949, by Woman's Day, Inc. It ranks in circulation and advertising among the leading national magazines, such as Life, Saturday Evening Post and Better Homes & Gardens, was the recipient of national awards for editorial, art and homemaking accomplishments, and is of content and quality comparable to and competitive with the well-known Good Housekeeping, Ladies' Home Journal, McCall's, Woman's Home Companion, and Household magazines. The cost per single copy for printing, publishing and distributing Woman's Day varied from approximately 17¢ to 21¢ during 1954, 1955, and 1956. It has been selling for 7¢ since 1951[7] (having originally been given away free), whereas Good Housekeeping, Ladies' Home Journal, McCall's and Woman's Home Companion sell on the newsstands for 35¢ per single copy. These latter magazines are obtainable at newsstands, drug stores, grocery stores, department stores and other sources as well as by subscription. Woman's Day is and always was obtainable only at A & P stores. It cannot be purchased by subscription, nor can it be purchased at a newsstand (except in Colorado where only about .4% of each issue is distributed and where A & P has no retail stores), drug store, other grocery store, department store or from other sources.

Since its inception Woman's Day has been identified as the A & P magazine. Since 1953, the cover of the magazine has carried the words "The A & P Magazine." It is actively promoted for sale by the use of all types of internal and external media, including other magazines, newspapers, radio and television. All of its food advertising is of products sold in A & P stores. However, there is no other significant relationship between A & P's handling of a supplier's food products and the advertising thereof in Woman's Day. That magazine also advertises

7. Until this suit was filed.

the food products manufactured by A & P through its subsidiaries and sold only in A & P stores.

Woman's Day is an effective medium for the advertisement of the A & P stores in general. It creates good will among the customers of A & P. It attracts new customers for A & P and keeps its old ones. It sells approximately 42 million copies a year. It is a promotional operation of A & P. It exists solely for competitive benefit to A & P's retail stores.

The annual cost of producing Woman's Day exceeds $9,000,000. Less than one-quarter of this cost is recovered through the sale of copies. The remainder is received from the sale of advertising space. This advertising revenue is received from suppliers and non-suppliers. Supplier advertisers are manufacturers whose products are sold in A & P stores, such as the three defendant suppliers. In 1954, 73.3% of the advertising revenue, or $6,905,021; and in 1955, 65.5% or $6,073,693, was received from supplier advertisers.

The number of Woman's Day advertisers in each class and the gross advertising revenue derived from each class in 1954 and 1955 were as follows:

Advertisers in Woman's Day

1954		
Suppliers	203	49.3%
Non-suppliers	209	50.7%
Total	412	100%
1955		
Suppliers	172	47.6%
Non-suppliers	189	52.4%
Total	361	100%

Revenue to Woman's Day from:

1954

Suppliers	$6,905,021	73.3%
Non-suppliers	2,508,822	26.7%
Total	$9,413,843	100%

1955

Suppliers	$6,073,693	65.5%
Non-suppliers	3,205,488	34.5%
	$9,279,181	100%

None of the plaintiff retailers or wholesalers owned or published a magazine of any kind. For certain periods covered by the complaint in this case, some of the plaintiff retailers carried a store distributed magazine, while others did not. Since May of 1956 no store distributed magazine has been available in the Area to any independent retailers or wholesalers, and since June of 1954 only one such magazine was on the market for handling by some independent retailers who were members of a particular cooperative purchasing group. It was known as Better Living and it ceased publication in May 1956. These facts were known to the defendant suppliers. Defendant suppliers from time to time advertised in the store distributed magazines in addition to Woman's Day.

Woman's Day is shipped by Woman's Day, Inc. to various Unit warehouses of A & P, from which the magazine is delivered by truck, with rare exceptions, to the individual A & P retail stores.

All A & P self-service stores are supplied with cash register racks to hold the copies of Woman's Day on sale. These racks are attached to the cash register at the check-out counters.

About 14,000 copies are sold each month in the State of Colorado by an independent distributor. Since February, 1951 the retail price has been 15¢.

Advertising of A & P and its subsidiaries and divisions in Woman's Day, is placed through Paris & Peart, Inc., New York City, an advertising agency. The latter is an independent agency which also represents clients, other than A & P and its subsidiaries.

The sale of advertising space in Woman's Day is pursuant to contracts between Woman's Day, Inc. and the advertising agency representing the advertiser. That advertising agency pays Woman's Day, Inc. the established advertising rate for the space purchased, less the customary agency commission of 15%, and collects from the advertiser the full charge for the space purchased. It is the general practice for the advertising agency, often after consultation with representatives of the advertiser, to recommend the media to its client. When Woman's Day is recommended, it is solely upon the evaluation by such agencies of Woman's Day as an effective advertising medium for the sale of the products of their respective clients to the consumer public. The advertising rates charged by Woman's Day, Inc. to Paris & Peart, Inc. for advertising placed in Woman's Day in behalf of A & P are the same as are charged by Woman's Day, Inc. to all other advertisers. Many nationally recognized advertising agencies have for years placed advertising in Woman's Day in behalf of their clients.

The rates paid by advertisers in Woman's Day are comparable to and competitive with those charged by magazines of comparable national circulation. Such advertising rates for 1956 were based upon a guarantee of a net paid advertising circulation of $3,375,000 during the calendar year. Certifications of circulation were made periodically by the Audit Bureau of Circulations, of which Woman's

Day, Inc. is a member. When in any given period Woman's Day, Inc. failed to deliver the circulation it had guaranteed its advertisers, it thereupon, pursuant to contract, made an adjustment to all of its advertisers. Such an adjustment is standard practice in the publishing business. The actual payments for such adjustments were made by Woman's Day, Inc. to the advertising agencies for the accounts of their respective clients.[8]

Woman's Day, Inc. has never given any refunds, rebates, credits, gratuities or allowances to A & P or any of its subsidiaries or divisions, with the exception of the circulation billing adjustments given to all advertisers.

At the time of the initial placement and on the occasion of each subsequent placement of advertising in behalf of defendant suppliers in Woman's Day, they were then selling, and had for some time prior thereto sold, products to A & P for resale through A & P retail stores.

The defendant suppliers have also advertised various of their products from time to time in other magazines of general circulation, such as Family Circle, Western Family, Everywoman's, American Family, Better Living, Good Housekeeping, Household, Ladies' Home Journal, Life, Saturday Evening Post, Colliers, Better Homes & Gardens, and Woman's Home Companion.

Typical manufacturers, advertising in Woman's Day and whose products are not sold in any A & P store, are the following:

Armstrong Cork Company	Floor coverings
General Electric Co.	Refrigerators
Spiegel, Inc.	Mail order
Olson Rug Co.	Rugs

8. During the calendar year 1955, Woman's Day, Inc. was unable to meet the guaranteed paid average circulation of 3,750,000 specified in its national rate card as the basis for its advertising rates, the average for that year being 3,500,000. It refunded 6.86% of its total advertising revenue for 1955.

Zenith Radio Corp.	Hearing aids
Toni Company	Home permanents
RKO Radio Pictures, Inc.	Motion pictures

The following manufacturers are typical of those (in addition to defendant suppliers), advertising in Woman's Day and whose products are sold in A & P stores:

American Tobacco Co.	Cigarettes
The Borden Co.	Cheese and milk
Harold H. Clapp	Baby food
General Mills, Inc.	Flour and cereals
H. J. Heinz Co.	Baby food and soups
Quaker Oats Co.	Cereals and dog food
Swift and Company	Meat products
William Wrigley Co.	Chewing gum

1. The essentially relevant language of § 2(e) is:

> "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity * * * by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities * * *."

The service or facility involved in this case is the publication Woman's Day. We find from the record before us that there is an absence of any evidence that defendant suppliers furnished or contracted to furnish, or contributed to the furnishing of, this publication. We are aware that the annual cost of producing the magazine exceeded $9,000,000 and that the revenue recovered from the sale of advertising space therein was equal to three quarters of that amount. We are further aware that in 1954, of the advertising revenue thus received, about 73% thereof was received from supplier advertisers, as against about 26% received from non-supplier advertisers, and that in 1955 the corresponding percentages were about 65% from suppliers and about 34% from non-suppliers:

Plaintiffs argue that what they urge is a violation of

§ 2(e) is not "made less so because the payment of the supplier is for advertising within the magazine, for the consequence thereof is that such payments pay a part of the cost of the magazine which A & P does not therefore have to pay. It is the absorption of the favored customer's costs which violates the Sections, and this is done whether or not those costs are paid by the supplier in exchange for advertising space." However, even if these conclusions of plaintiffs are factually correct, they do not embody the test set forth in § 2(e), which requires that plaintiffs prove that defendant suppliers furnished or contracted to furnish or contributed to furnishing of the magazine in question. While a passenger upon a railroad, when he pays his fare, may pompously remind a conductor that he is contributing to the payment of the conductor's salary, the transaction actually is not a traceable contribution to any one specific item of the railroad's expenditures for operation. The fare becomes commingled with other revenue of the carrier and, although it augments the mass of gross revenue from which the salaries of employees and other expenses are paid, it cannot sensibly be said that any one passenger is furnishing or contributing to the salary of any one employee. If a contrary interpretation of such a transaction were intended by Congress to be applied to the payment of advertising charges by an advertiser in a magazine, to the end that each dollar paid by the advertiser on its bill for advertising therein should be considered the furnishing or contributing to the furnishing of the publication itself, Congress would have used language expressing such an intent.

The pertinent facts in this case reveal the correctness of the aforesaid conclusion. The placing by the suppliers' advertising agencies of advertisements in Woman's Day was not concurrent with the beginning, or with the ending of A & P stores' handling of each supplier's products on

its shelves. The advertising charges paid by these suppliers were computed according to the same method used in fixing the charges to be paid by all advertisers in that publication. Defendant suppliers in no way dictated the editorial or other policies of Woman's Day. They did not manage or control the operation thereof. They did not have anything to do with the printing of the magazine or the furnishing of any paper or materials used in the magazine's publication. In short, defendant suppliers were simply buying an advertisement from Woman's Day, Inc. They were dealing at arms' length. They paid for the advertisement which they bought. They were not furnishing or contributing to the furnishing of any part of the production of the magazine. That production was exclusively a function of Woman's Day, Inc.

We, therefore, hold that the district court was correct in concluding that plaintiffs failed to prove a violation of § 2(e).

2. The essentially relevant language of § 2(d) is:

> "It shall be unlawful for any person * * * to pay or contract for the payment of anything of value to or for the benefit of a customer of such person * * * for any services or facilities furnished by or through such customer in connection with the * * * sale, * * * of any products * * * sold, * * * by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products * * *."

Here is a rigid definition of acts constituting "unlawfulness". The *fact* of paying or contracting for the payment for the services or facilities referred to is proscribed, subject to the exception contained in the clause commencing "unless". It is apparent that Congress has not made relevant the motive or intent of him who thus pays or contracts to pay. *United States* v. *E. I. du Pont*, 353 U. S. 586,

607. We believe that the district court erred in relying upon the fact that it found that there was no evidence of any ulterior *motive* on the part of defendant suppliers in advertising in Woman's Day nor that said suppliers had *intended* to favor A & P over other customers. 154 F. Supp. at 477.

The defendant suppliers paid, and contracted to pay, money to Woman's Day, Inc., a controlled subsidiary of A & P, for advertising in a magazine furnished by A & P in connection with the sale of products manufactured, sold, or offered for sale by said suppliers. § 2(d) made that transaction unlawful, unless such payment or consideration was available on proportionally equal terms to all other customers competing in the distribution of such products. In effect, § 2(d) declares as a general rule what is unlawful and, by way of exception[9] to the rule (not as a condition thereof), provides for an escape from its applicability. The burden is upon the party who seeks the protection of the exception, to prove that it applies to the presented facts. *Canadian Pac. Ry. Co.* v. *United States*, 73 F. 2d 831, 834; *Basham Co.* v. *Lucas*, 21 F. 2d 550, 551, affirmed 30 F. 2d 97; see also *United States* v. *Dickson*, 40 U. S. 141, 10 L. Ed. 689. Cf. *Harvey L. Velde, Trustee, etc.* v. *Ezra Rumbold*, 256 F. 2d 163. This language required defendant suppliers to prove in the district court that the payments for advertising or alternative appropriate benefits were available on proportionately equal terms to all customers competing with A & P in the distribution of their said products. This they failed to do.

In *Elizabeth Arden Sales Corp.* v. *Gus Blass*, 150 F. 2d 988, 994, the court utilized the language of the Federal Trade Commission when it said, at 994:

"* * * The furnishing of a service or facility which

9. "Unless" means "except". Webster's New International Dictionary (1957) 2d ed.

> cannot be proportionalized for the benefit of competing purchasers or, in the alternative, the failure or refusal to proportionalize the terms upon which services or facilities are granted, so as to make it reasonably possible for competing purchasers to avail themselves of such services or facilities if they desire to do so, constitutes a failure to accord such services or facilities upon proportionally equal terms.' "[10]

The district court relied on the fact that "none of the plaintiffs offers for sale a store magazine as apparently no such magazine is available for their distribution. * * The question arises, therefore, whether the Act is violated if the one purchaser is unable to furnish a service which that purchaser's competitor furnishes and for which the common supplier makes payment. * * *": That court said:

> "In the instant case the plaintiffs do not publish or sell a store distributed magazine and, thus, they are unable and unequipped to render or furnish the services for which payment would be made and for which the defendant suppliers in this case pay Woman's Day. Being so unable to furnish these services, plaintiffs have no standing to complain about the defendant suppliers' advertising in Woman's Day even if it were assumed that these payments violated the Act. * * *"

Both sides in this case cite parts of the Report of the Attorney General's National Committee to Study the Antitrust Laws, of March 31, 1955. On page 189 of the report, it is said:

> "The criterion of 'proportionally equal terms' in Sections 2(d) and 2(e) has recently been construed by the Federal Trade Commission. In the recent Trade Practice Rules for the Cosmetics Industry and its opinion in the *Soap* cases, the Commission has evolved a rule of thumb for testing the requisite pro-

10. While the court was referring to a case before the Federal Trade Commission involving § 2(e), the quoted language is also applicable to § 2(d).

portional equality in allowances or services by comparing the promotional benefit with the dollar volume of purchases by various customers. In actual practice, promotional programs can thus conform to the law in three basic ways: (1) payment of a dollar allowance per unit of promotional service rendered by each buyer, up to a uniform maximum percentage of his dollar volume; (2) a simplified plan, granting each buyer a set dollar allowance per unit of merchandise bought, on condition that *he* perform a specified minimum quantum of promotional services; (3) the *seller's* direct furnishing of promotional services to the buyer, worth a uniform percentage of each buyer's volume. The Commission's recent clarification of 2(d) and 2(e) also recognized that not all customers entitled to participation in a seller's promotional plan can effectively utilize each type of promotional service tendered, or perform that form of service which the seller desires to reward with an allowance under his plan. However, to ensure appropriate benefits to all qualified customers, the Commission expects the seller to offer *bona fide* alternative means enabling all buyers to participate in some form. In that event, a reasonable relationship among the several available types of service or allowance must be maintained, though the *rate* of compensation for different forms of service may vary. In this way, the statutory standard of proportional equality has been translated by the Commission into workable rules of law."

In determining the proportionally equal terms upon which a seller shall make available any payment or consideration referred to in § 2(d), the Act requires a frank recognition of the business limitations of each buyer. An offer to make a service available to one, the economic status of whose business renders him unable to accept the offer, is tantamount to no offer to him.

We, therefore, hold that the district court was in error in concluding that plaintiffs failed to prove a violation of § 2(d) by defendant suppliers.

3. Defendants argue in this court that plaintiffs have failed to prove injury or "the fact of damage", as required by § 4 of the Clayton Act.[11]

Plaintiffs' counsel point out that the district court considered only the issue of defendants' liability under the Clayton Act and did not consider whether plaintiffs had established the "fact of damage or injury" under § 4. From an inspection of the record before us, we find that the latter statement is correct. We also find that, not only did the district court separate the "issue of liability" from the "issue of damages", *ante 1*, but also that no objection appears to have been made to said action by any party hereto, either in the district court or in this court. The record does not show that the district court at any time made, or was asked to make, any finding of fact or conclusion of law, involving or resolving the issue of injury to the business or property of plaintiffs or their damages.[12]

It is elementary that this court, in the exercise of its appellate jurisdiction, will not pass upon any question as to which the district court, without objection of counsel for any party, failed to make a decision. Upon a remandment to that court, counsel have a right to ask for complete rulings on such a question.

4. Defendant suppliers make in this court a contention that plaintiffs have not shown that they are entitled to bring a class suit. The record reveals that the district court did not rule upon this contention. Upon a remandment it should do so.

For the reasons herein set forth, the judgment of the district court in favor of defendants A & P and Woman's Day, Inc, is affirmed, and, as to defendant suppliers, said

11. 15 U.S.C.A. 15.

12. The court made only a limited entry into this field. See findings of fact 171-174 and 176.

judgment is reversed and, as to said defendant suppliers, this cause is remanded to that court for further proceedings not inconsistent with the views herein expressed.

Judgment in Part Affirmed and in Part Reversed and Remanded With Instructions.

FINNEGAN, *Circuit Judge.* I am unable to agree with all that is said by Judge Schnackenberg in his opinion, and I differ with the majority in their disposition of this appeal.

JUDGMENT ORDERS.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Friday, July 25, 1958.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

State Wholesale Grocers, an Ill. corporation, *et al.*, *Plaintiffs-Appellants,* *vs.* The Great Atlantic & Pacific Tea Company, *et al.*, *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12178	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause in favor of defendant, The Great Atlantic and Pacific Tea Company is affirmed, and, as to defendant suppliers, said judgment is reversed, and, as to said defendant suppliers, this cause is remanded to the said District Court

for further proceedings not inconsistent with the views expressed in the opinion of this Court filed this day.

It is further ordered that each party to this appeal is taxed with its own costs in this Court, with the exception that one-half (½) of the costs of printing the appendix to appellant's brief is taxed against the appellees, General Foods Corporation, Morton Salt Company and Hunt Foods, Inc. and the other one-half (½) is taxed against the appellants.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Wednesday, September 17, 1958.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

State Wholesale Grocers, an Illinois corporation, *et al.*,
Plaintiffs-Appellants,
vs.
The Great Atlantic and Pacific Tea Company, a New Jersey corporation, *et al.*,
Defendants-Appellees.

No. 12178

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS HEREBY ORDERED that the judgment entered by this Court on July 25, 1958 be amended to read as follows:

"Friday, July 25, 1958.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

"State Wholesale Grocers, an Illinois corporation, *et al.*, *Plaintiffs-Appellants*, vs. The Great Atlantic and Pacific Tea Company, a New Jersey corporation, *et al.*, *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12178

"This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

"On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause in favor of defendants The Great Atlantic and Pacific Tea Company and Woman's Day, Inc. is affirmed, and, as to defendant suppliers, said judgment is reversed, and, as to said defendant suppliers, this cause is remanded to the said District Court for further proceedings not inconsistent with the views expressed in the opinion of this Court filed this day.

"It is further ordered that each party to this appeal is taxed with its own costs in this Court, with the exception that one-half (½) of the costs of printing the appendix to appellants' brief is taxed against the appellees, General Foods Corporation, Morton Salt Company and Hunt Foods, Inc., and the other one-half (½) thereof is taxed against appellants."

ORDERS DENYING PETITIONS FOR REHEARING

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Tuesday, September 23, 1958.

Before:

Hon. F. Ryan Duffy, Chief Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. John S. Hastings, Circuit Judge.
Hon. W. Lynn Parkinson, Circuit Judge.
Hon. Win G. Knoch, Circuit Judge.

State Wholesale Grocers, *et al.*,
Plaintiffs-Appellants,
No. 12178 *vs.*
The Great Atlantic & Pacific Tea Company, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court, en banc, that the petitions for a rehearing en banc filed herein on August 22, 1958 and August 25, 1958 be, and the same is hereby, DENIED.

Chief Judge Duffy and Judge Finnegan voted in favor of granting said petitions for a rehearing en banc.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Tuesday, September 23, 1958.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

State Wholesale Grocers, *et al.*; *Plaintiffs-Appellants*, vs. The Great Atlantic & Pacific Tea Company, *et al.*, *Defendants-Appellees*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12178	

It is ordered by the Court that the petitions for a rehearing filed herein on August 22, 1958 and August 25, 1958 be, and the same are hereby, DENIED.

FINNEGAN, *C. J.* "I would allow the petitions for rehearing."

THAT PART OF DISTRICT COURT OPINION RELATING TO THE SECTION 2 (d) ISSUE.

The Section 2(d) Issue.

In discussing Section 2(d), it becomes necessary to examine the methods employed by each of the Defendant Suppliers in determining the medium in which each should advertise and particularly whether each should advertise in *Woman's Day* magazine.

General Foods.

General Foods is a large food merchandising company which handles more than 50 different grocery store products. In its 1956 fiscal year it sold $759,200,000 worth of grocery products and spent more than $75,180,000 in advertising them.

General Foods is comprised of eleven operating divisions.

The marketing function of each division selling grocery store products is in charge of a marketing manager who is responsible for the advertising and selling of all the products of that division. Reporting to the marketing manager are the product group managers or the particular product managers. Product group managers and product managers are responsible for the development and execution of marketing plans, including advertising plans, for the specific products assigned to them. Both the initial and final decision on the contents of a marketing plan are made by the product group manager or product manager, subject to the approval of his superiors. The responsibility of selecting and recommending the specific advertising media within the framework of the marketing plan rests

with the particular advertising agency retained by the company.

In determining what medium should be used to advertise a particular product (whether magazines, newspapers, outdoor posters, car cards, radio or television), General Foods' advertising agencies take many factors into consideration. These factors include the stated objectives of the advertising program; the nature and strength of the competition; who are the prospective purchasers of the products—i. e., men, women, children, age, income bracket, educational level; the locality where these prospects live—i. e., in small towns and rural communities, in cities, in metropolitan centers, in which geographical areas of the country; and the distribution pattern of the particular product.

If the agency retained by General Foods determines that an advertising effort or part of any advertising effort should be through magazines, the selection of the magazines, or of a particular magazine, requires the weighing of many considerations, such as circulation, geographical distribution of readers, cost per thousand circulation, number of readers for each copy, characteristics of the magazine and its readers, education and income level of the magazine's audience, the prestige of the magazine, and the nature and quality of its editorial material.

Applying these general considerations to the case at bar, it has been stipulated that the criteria considered by General Foods in determining whether or not *Woman's Day* was to be included in a media schedule for a particular product were the same criteria that were considered by General Foods in the selection of any other magazine or medium.

Hunt Foods.

Hunt Foods is a large food merchandising company which handles more than 15 different grocery store prod-

ucts. In its 1955 fiscal year Hunt sold $85,558,310 worth of grocery products and spent $5,741,000 advertising them. Hunt's advertising program is prepared by its advertising department in consultation with the particular advertising agency retained by it.

Hunt considers many criteria and factors in selecting publications in which to advertise its products. Among these factors are the publication's circulation, and all aspects thereof including not only the total figure but also the pattern of this circulation by geographical areas. Hunt also considers the cost of using the publication, and specifically, the base page rate and quantity and frequency discounts. Another criterion that Hunt considers is the audience statistics such as the relation of men to women readers and how large the total audience becomes as a result of secondary and pass-along readership. Hunt also considers the editorial policies of the publication and its mechanical quality, such as the process by which it is printed and the quality and size of its paper. Hunt gives primary consideration to an adequate "national" advertising program using media whose circulation figures bear a proper relationship to the national population pattern. After providing for national coverage, Hunt then considers those media which have a more regional than national influence.

The extent of Hunt's advertising in any particular medium is determined by the amount of money which can be allocated to advertising in a given period and by selecting the medium that it feels best reaches the potential customers of its products and also best serves its designated purposes.

In deciding to advertise in *Woman's Day* magazine, Hunt has used and considered the same factors and criteria which it considered in determining to advertise in any other publication.

Morton Salt Company.

Morton Salt is a substantial producer of various salt products. In 1955 Morton sold $7,327,672 worth of salt products and spent $2,342,619 in advertising them. Morton's advertising program is the result of consultations and deliberations between Morton's advertising agency and Morton's advertising department.

In determining whether to advertise in a particular publication, Morton considers that publication's total circulation; its cost per thousand circulation; its gross cost; the characteristics of the publication's readers according to age, education, etc.; the publication's geographical circulation and circulation in terms of population density both as compared with Morton's sales and total grocery store sales; and, finally, Morton also considers the quality of the printing reproduction. In deciding to advertise in *Woman's Day* Morton has been guided by the same factors that it considered in determining to advertise in any magazine.

In summation, viewing the processes which the Defendant Suppliers utilized in choosing to advertise in *Woman's Day* magazine, the evidence is clear that these defendants chose to advertise in *Woman's Day* after having weighed the same criteria that they considered before advertising in any medium and, more specifically, in any magazine. *Woman's Day* magazine met the test to which each of the Defendant Suppliers placed any magazine, passed it, and, as a consequence, each of the Defendant Suppliers placed their advertisements therein. Thus, there is no evidence of any ulterior motive on the part of the Defendant Suppliers in advertising in *Woman's Day* nor does it appear that the Defendant Suppliers had intended to favor A&P (New Jersey) over any of its other customers. It is also interesting to note that it has been stipulated that the ex-

tent to which A&P promotes or merchandises the products of its suppliers is and has been in no way affected by the fact that such suppliers do or do not advertise in *Woman's Day* or by the extent of such advertising if there is any. Additionally, the evidence also reveals, through the testimony of Harry B. George, National Director of Purchases of A&P, that whether manufacturers or processors of grocery store products do or do not advertise in *Woman's Day* is never considered in any manner by A&P in deciding whether, or to what extent, to purchase their products for resale in A&P retail stores. George also testified that the advertising in *Woman's Day* by such manufacturers or processors has no effect on the prices paid by A&P for products purchased for resale in A&P retail stores. Plaintiffs, however, attach no significance to this evidence, which they do not dispute, but argue that, nonetheless, the Act has been violated, if equal payments have not been afforded to them.

Nor do the plaintiffs attach any significance to the evidence which clearly reveals that the Defendant Suppliers receive full value for their payments for their advertisements in *Woman's Day*. *Woman's Day* is, admittedly, a high quality magazine enjoying a substantial circulation. This fact, when considered with the fact that the advertising rates charged by Woman's Day, Inc. to all advertisers in *Woman's Day*, including the Defendant Suppliers, for advertisements in said magazine are comparable to and competitive with the rates charged and prices paid per thousand circulation in magazines of comparable national circulation, makes the conclusion inescapable that the Defendant Suppliers receive full value for their advertisements in *Woman's Day*. Plaintiffs do not contend otherwise but argue that whether the Defendant Suppliers receive full value is immaterial in view of the fact that like payments by the Defendant Suppliers were not made available to the plaintiffs on proportionally equal terms.

In support of their position, plaintiffs cite a passage from Congressman Utterbach's speech which was given just before the adoption of the Act. Congressman Utterbach stated:

> "The existing evil • • • is, of course, the grant for discriminations under the guise of payments for • • • services which, *whether or not* • • • *actually rendered as agreed*, result in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves." (emphasis, plaintiffs) 80 Cong. Rec. 9418.

Plaintiffs emphasize the words, "whether or not • • • actually rendered as agreed," as indicating that it does not matter that the supplier receives value for his payments for such "services." This reasoning, however, is clearly untenable for it is manifest that Congressman Utterbach was speaking there of services which, of their very nature, were designed primarily to benefit the customer. Thus, if the service paid for is designed primarily to benefit the customer then it matters little if the services are rendered or not—on the one hand, the customer is benefited by the services which the supplier pays for, and on the other hand, the customer, instead of having the services performed, is benefited by keeping the money given him by the supplier. Either way, the customer is benefited and the Act is violated if the service to be rendered is designed primarily to benefit the customer.

Thus, in the Senate and House Committee Reports, it is stated:

> "Still another favored medium for the granting of oppressive discriminations is found in the practice of large buyer customers to demand, and of their sellers to grant, special allowances in purported payment of advertising and other sales-promotional services, which the customers agree to render with reference to the seller's products, or sometimes with reference to his

business generally. Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when, in any case the *customer is deriving* from it *equal benefit* to *his own business* and *is thus enabled to shift to his vendor substantial portions of his own advertising cost* while his smaller competitor, unable to command such allowances, cannot do so." (emphasis added) Senate Report No. 1502, p. 7; House Report No. 2287, p. 15; 74th Cong. 2d Sess. 1936.

It is apparent, therefore, from a study of this section, as well as from a study of the entire legislative history of the Act, that where there is a service paid for by the supplier, and the service is actually rendered and the amount so paid is not in excess of the value of the service, it is necessary to determine: 1) whether the service would benefit only the supplier; 2) whether the service would benefit only the customer; or 3) whether the service would benefit both the supplier and his customer. If a service can be said to benefit only the supplier or if the service benefits only the customer, there is no difficulty, as in the one case the Act is violated while in the other it is not. However, where it is conceivable that a service might benefit both the supplier and the customer, then, and only then, it becomes necessary to determine whom the services were *primarily* designed to benefit. If the services were primarily designed to benefit the supplier, the Act has not been violated; if the services were primarily designed to benefit the customer, then the Act has been violated unless proportionally equal treatment has been given that customer's competitor. If it is made to appear that equal benefits accrued to both the supplier and his customer from the service, then also the Act has been violated; and in determining whether the customer receives equal benefit, it must be made to appear that the customer has been able to shift to his supplier "substantial portions of *his own advertising*

costs.'' It becomes necessary, therefore, to examine the nature and extent of the benefits flowing from the Defendant Suppliers' paid advertisements in *Woman's Day* magazine.

As has been indicated, the advertisements in *Woman's Day* of each of the Defendant Suppliers were the result of a careful evaluation of *Woman's Day* as an advertising medium, each Defendant Supplier, through its advertising department and advertising agency, employing the same criteria in choosing to advertise in *Woman's Day* that it considered in choosing to advertise in any medium. *Woman's Day* is a high quality magazine of national prominence and it is considered an excellent advertising medium as attested by the list of nationally prominent advertisers (both food suppliers and non-food suppliers) that place their advertisements regularly in *Woman's Day*. And it is manifest that the Defendant Suppliers receive full value for their payments for their advertisements in *Woman's Day*. These facts, when considered with the absence of any evidence tending to establish any purpose or intent on the part of the Defendant Suppliers, individually or collectively, to favor A&P (New Jersey) over the Defendant Suppliers' other customers, clearly establish that each of the Defendant Suppliers' advertisements in *Woman's Day* was a component part of each supplier's advertising program which was designed only to promote public acceptance of the product advertised and, as such, was designed primarily to benefit each of the Defendant Suppliers. Indeed, there is no evidence of any ulterior motive on the part of any Defendant Supplier in advertising in *Woman's Day*.

Plaintiffs seem to suggest that the advertisements of each of the Defendant Suppliers in *Woman's Day* were A&P advertisements. To answer this, it is necessary to distinguish between grocery store advertising and national

brand advertising of groceries. Grocery store advertising is designed and intended to bring people into a particular store and features the price of the product and the location of the store. National brand advertising, conversely, mentions no price and does not mention the name or location of any store or stores—it merely attempts to acquaint the reader with the desirability of trying a particular nationally known, brand name product.

In the instant case, the evidence reveals that the advertisements of each of the Defendant Suppliers were advertisements of the various products handled by each supplier; the advertisements failed to make any reference to the price of the particular product advertised, nor did they include any mention of the name or location of any store where these products might be purchased. Indeed, the copy of each of the Defendant Suppliers' advertisements in *Woman's Day* was identical with the copy run by each Defendant Supplier in other magazines and newspapers that were issued at or about the same time as was the particular issue of *Woman's Day*. Thus, the copy of each of the Defendant Suppliers' advertisements in *Woman's Day* was not in any way tailored to that magazine. The conclusion is inescapable that the advertisements of each of the Defendant Suppliers in *Woman's Day* were national brand advertisements of grocery products as distinguished from grocery store advertisements. This is but one of the facts which conclusively establish that the advertisements of each of the Defendant Suppliers were not A&P advertisements but were advertisements primarily designed to benefit each Defendant Supplier by promoting the sales of Defendant Suppliers' products to as many potential purchasers as possible, with the benefits accruing to A&P being only incidental.

That the advertisements of the Defendant Suppliers in *Woman's Day* were not A&P advertisements but national

brand name grocery product advertisements with the benefits accruing to A&P being incidental to the benefits accruing to the Defendant Suppliers, is also established by the evidence that conclusively shows that the Defendant Suppliers' product advertising in *Woman's Day* aids in the sale of the advertised products by all grocers who carry the product advertised. This finding is based on several facts, the most important of which is that purchasers of food products do substantial shopping in more than one store. Indeed, the plaintiffs themselves, in attempting to show competition between A&P stores and independent retailers, argue, in their briefs, that the A&P and the independent are competing for the trade of the same customer "who interchanges his patronage."

The document entitled *Bench Marks for the Next Five Years in Grocery Selling* (Morton's Ex. 11), which was an address given to the National-American Wholesale Grocers Association, on September 13, 1955 by Curtis C. Rogers, Executive Vice President of the Market Research Corporation of America, contains some rather illuminating statistics concerning store loyalty of shoppers. On page 5 of this document, Rogers states, with respect to Chart VI appearing on that page:

> "But families don't shop in just one grocery store. The average family shops in 3.7 stores per month. The families shopping in independent stores average 2.6 stores per month, while the exclusive chain store families shop in nearly 2 stores per month. But remember that ¾ of all of the families shop in both chains and independents, and this group are really shoppers—they average 4½ stores per month."

And on page 11 of Morton's Exhibit 11, Rogers states with respect to Chart XII appearing on that page:

> "We find that out of each 100 families who bought coffee in Store A, 44 made their next purchase of coffee

at some other store—on canned vegetables, 56 bought their second purchase at some other store—and on frozen vegetables, 52 bought next at a different store. The *housewife shops* where she can get the *brands* and the *products* that she wants at prices that represent the best value to her." (Emphasis, his)

The findings contained in Chart XII of Morton's Exhibit 11 were the result of a two-week shopping history of typical grocery items, while the findings reflected by Chart VI appear to be the result of a 15-year study of that particular topic. These findings are persuasive in corroborating what I believe to be facts that cannot be seriously disputed. Competition between grocery stores is very keen and in these days of the high cost of living, the housewife is well aware of the necessity of seeking out a bargain. As a result, the housewife shops "where she can get the *brands* and the *products* that she wants at prices that represent the best value to her." She becomes acquainted with the necessary facts concerning a bargain in a number of ways, one of which being the grocery store advertisements appearing in newspapers and in handbills distributed to the homes in the vicinity of a particular store. On the other hand, the national brand grocery product advertising by the Defendant Suppliers appearing in *Woman's Day* might acquaint the reader with the desirability of trying a particular brand name food or keep the name of that product before the public, much the same as it does when it appears in other magazines such as *Life*, *McCall's*, *Look*, etc., but that advertising is not a suggestion, much less a command, to purchase the article at A&P. The food shopper buys where she can purchase the brands and products at the least cost to her. If an advertisement in *Woman's Day* attracts her attention favorably, she will purchase that product at one of the stores which she patronizes, if the price is right. Thus, viewing the lack of store loyalty

among grocery store shoppers, and considering the fact that the grocery shopper interchanges her patronage and buys where she can get the quality product for the least money, and considering also the fact that the Defendant Suppliers' advertisements in *Woman's Day* are national brand name grocery product advertisements, which suggest neither the price nor place where the products might be purchased, I find that the advertisements by the Defendant Suppliers in *Woman's Day* magazine are designed to aid in the sale of the advertised products by all grocers who carry that product and not merely A&P. Accordingly, I find that, assuming that said advertisements in *Woman's Day* do the job that they were intended to do, the advertisements in *Woman's Day* have, in fact, aided in the sales of the advertised products in all grocery stores and not merely A&P stores.

Corroborative of this finding is a letter (A&P Ex. 61) received by Woman's Day, Inc. from Heublein & Bro., makers of A.1. Sauce. After informing *Woman's Day* that Heublein's experience was that *Woman's Day* produced an unusually high number of requests for an advertised A.1. Sauce booklet, the letter dated December 3, 1943, stated as follows:

> "Therefore, I am very happy to tell you of the swell job *Woman's Day* is doing for A.1. Sauce. Even more significant is the fact that we can definitely trace a substantial increase in the sales of A.1. Sauce since we started using *Woman's Day* several years ago; not only through the A&P Stores, where the magazine is distributed but also through the other stores located in the neighborhood of the A&P stores.
>
> "This indicates to us an increased sale through all outlets catering to and competing for the business in the shopping neighborhoods adjacent to an A&P Store where *Woman's Day* is distributed."

Plaintiffs seek to discredit the weight of this letter by arguing that *Woman's Day* apparently could find only one such document from thousands of documents that were available to it. Assuming that this is true, nevertheless no document was introduced which stated a position contrary to the contents of Heublein's letter. Furthermore, the Heublein letter merely corroborates the conclusion drawn from the other evidence adduced; that is, the nature of the particular type of advertising in *Woman's Day* and the lack of store loyalty among grocery shoppers conclusively show that the Defendant Suppliers' advertisements in *Woman's Day* aided in the sales of the products advertised not only in A&P stores but also in all grocery stores carrying that particular product.

Underlying the conclusion that advertisements in *Woman's Day* aid in the general sale of the particular product advertised, is the fact that *Woman's Day* is not an "in-store" promotional device. In other words, although the shopper purchases the magazine in an A&P store, she does not read the magazine in the store. Thus, the shopper picks up a copy of the magazine at the check-out counter of an A&P store and does not get an opportunity to read the magazine until she leaves the store. That being the case, she is not exposed to Defendant Suppliers' advertisements in *Woman's Day* until after she leaves the A&P store. Assuming that an advertisement in *Woman's Day* arouses her desire to purchase a particular product, the shopper is free to purchase that product in the next store she visits if the price is acceptable. And it should be observed that many copies of *Woman's Day* are passed along to other readers who perhaps do not shop at an A&P store. Clearly, therefore, *Woman's Day* is not an "in-store" promotional device and, as such, the advertisements therein may benefit all grocery stores and not merely A&P stores.

Concerning the issue whether A&P shifts substantial portions of its own advertising costs to the Defendant Suppliers, here again, plaintiffs' position is unsupported by the evidence. As has been indicated, the advertisements in issue were designed primarily to benefit each of the Defendant Suppliers for which each received full benefit for their payments. The benefit accruing to A&P from these advertisements was merely incidental to that accruing to each of the Defendant Suppliers. These advertisements were not A&P advertisements but national brand grocery product advertisements. The evidence reveals that A&P spends millions of dollars in advertising each year. It is also interesting to note that the various A&P manufacturing subsidiaries, which compete with the Defendant Suppliers, advertise their products in *Woman's Day* for which full payment to Woman's Day, Inc. is made. Plaintiffs attempt to belittle these facts by arguing that A&P derives cost-free advertising from the promotion and sale of *Woman's Day*. Underlying this contention, however, is plaintiffs' argument that the Defendant Suppliers make *Woman's Day* possible by their payments for advertisements therein; but this contention, as has been indicated hereinbefore in this memorandum, is totally without merit. Nor is it true that A&P receives cost-free advertising from *Woman's Day* because the record shows that A&P has paid for certain of *Woman's Day* advertisements on radio, television and in the newspapers, and the record also reflects that the costs of distribution of the magazine from the warehouse to the store are assumed by A&P, not to mention the fact that certain A&P employees devote an appreciable amount of time in the promotion, distribution and sale of *Woman's Day*. It is quite apparent, therefore, from the evidence adduced that A&P does not shift substantial portions of its own advertising costs to the Defendant Suppliers.

For the reasons stated, I hold that the advertisements of each of the Defendant Suppliers in *Woman's Day* magazine were not A&P advertisements but advertisements primarily designed to benefit each of the Defendant Suppliers who received full value therefrom with the benefits accruing to A&P being incidental to those accruing to each of the Defendant Suppliers. I also hold that the evidence fails to reveal that A&P has shifted to the Defendant Suppliers substantial portions of A&P's own advertising costs. Accordingly, I hold that the plaintiffs have failed to prove that the Defendant Suppliers have violated Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act.

There are, however, other reasons which compel such a finding. The evidence reveals that the Defendant Suppliers advertised in other store distributed magazines, such as *Family Circle, Better Living, Everywoman's* and *American Family. Better Living* was sold by seven of the plaintiffs until it suspended publication in May 1956. At present, none of the plaintiffs offers for sale a store magazine as apparently no such magazine is available for their distribution. However, I think a reasonable inference could be drawn from the evidence adduced that the Defendant Suppliers would advertise in a magazine distributed by any of the plaintiffs if it met the fixed standards that must be satisfied before each of the Defendant Suppliers decided to advertise in any magazine. The question arises, therefore, whether the Act is violated if the one purchaser is unable to furnish the service which that purchaser's competitor furnishes and for which the common supplier makes payment. Stated in another way, assuming *arguendo* that the payments by the Defendant Suppliers in this case for advertisements in *Woman's Day* violated Section 2(d) of the Act, how could the Defendant Suppliers have nullified that violation by making proportionally equal payments to the plaintiffs, if the plaintiffs could not furnish

the service for which payment would be made? Congressman Utterbach answers this dilemma by stating:

> "But it is further claimed that the provisions of the bill with regard to advertising allowances work a hardship on the small manufacturer, in that they require such allowances to be granted to all competing customers on proportionally equal terms. But proportional to what? Proportional naturally to those customers' purchases and to their *ability and equipment to render or furnish the service or facilities to be paid for*". (Emphasis added) 80 Cong. Rec. 9146.

In the instant case, the plaintiffs do not publish or sell a store distributed magazine and, thus, they are unable and unequipped to render or furnish the services for which payment would be made and for which the Defendant Suppliers in this case pay *Woman's Day*. Being so unable to furnish these services, plaintiffs have no standing to complain about the Defendant Suppliers' advertising in *Woman's Day* even if it were assumed that these payments violated the Act. This seems manifestly clear from the overall intent of the Act and particularly from the quoted excerpt from Congressman Utterbach's speech. Plaintiffs' suggestion that this difficulty could be cured if A&P made *Woman's Day* available for sale in all grocery stores, including plaintiffs', is untenable for the simple reason that the Act imposes no such duty on one customer of the common supplier to furnish for his competitor services which the competitor is unable to render and for which the common supplier would make payment to him.

Plaintiffs fail to cite any authority which militates against the conclusions reached in this memorandum. The cases they cite, unlike the case at bar, involved services which were inherently discriminat[illegible] in that they could in no way benefit any customer ot[illegible]han the customer to whom the service was given. Thus, in each case the serv-

ice involved was primarily designed to benefit the one customer and not the supplier, or at least the benefits were equal between the two.

In *Corn Products Co.* v. *Federal Trade Commission*, 324 U. S. 726, Corn Products spent $750,000 in advertising Curtiss candy bars as being "rich in dextrose." Corn Products had sold dextrose to Curtiss which processed the dextrose into candy bars which Curtiss then sold to the consuming public. The Supreme Court held that Corn Products' failure to make those advertising services available to its customers on proportionately equal terms violated Section 2(e) of the Act. In that case it is quite clear that Corn Products was primarily advertising Curtiss candy bars and that it was assuming advertising costs which properly should have been borne by Curtiss. The results of these advertisements could have in no way benefited any of Curtiss' competitors and thus it could not have been said that the results thereof benefited Corn Products primarily and Curtiss only incidentally.

In *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988, C. A. 8 Cir., Elizabeth Arden paid one customer for the entire salary of a store clerk who was provided by that customer to demonstrate Elizabeth Arden products. However, Elizabeth Arden paid another customer, who was a competitor of its first customer, only one-half of the salary of the demonstrator provided by it. The Court of Appeals for the Eighth Circuit held that this unequal treatment to competing customers of Elizabeth Arden bore no reasonable basis and was therefore discriminatory and violative of the Act. Thus, it is again manifest that the demonstrator's service could in no way benefit any competitor of the favored customer. The demonstrator's service was designed primarily to benefit the one customer with Elizabeth Arden assuming costs for services which ordinarily

should be assumed by the customer who resells the product to the consumer.

And so it is with the services involved in the Federal Trade Commission cases cited by the plaintiffs. Each case involved services which were inherently discriminatory and which were primarily designed to benefit only the customer. No useful purpose would be gained by going into a more detailed discussion of those cases; suffice it to say that they are readily distinguishable on their facts from the instant case.

TYPICAL ADVERTISEMENT OF A GENERAL FOODS PRODUCT IN *WOMAN'S DAY* AND SCHEDULE OF OTHER PUBLICATIONS IN WHICH IT APPEARED

The advertisement appearing on the opposite page appeared in the January, February and March, 1954 issues of *Woman's Day* and is typical of the advertisements of General Foods products that appeared at various times in *Woman's Day*. The identical advertisement appeared in other publications in the issues listed below (see General Foods Ex. 24).

Name of Publication	Issues
Better Homes & Gardens	October, 1953; January, February, March, 1954
Capper's Farmer	October, November, 1953; January, February, 1954
Country Gentleman	October, November, 1953; January, February, 1954
Family Circle	October, November, 1953; January, February, March, 1954
Farm Journal	October, November, 1953; January, February, 1954
Good Housekeeping	October, November, December, 1953; February, 1954
Ladies' Home Journal	October, November, December, 1953
Life	October, October, November, November, November, 1953; January, January, 1954
Look	October, October, November, 1953
Progressive Farmer	October, November, 1953; January, February, 1954
Saturday Evening Post	October, October, November, 1953
Sunset	October, November, 1953; January, February, 1954

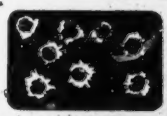
AMAZING COFFEE DISCOVERY!

Not a powder! Not a grind! But millions of tiny "FLAVOR BUDS" of real coffee...ready to burst instantly into that famous Maxwell House flavor!

Utterly unlike old-style "instants"... just as quick but tastes so different! In the famous Maxwell House kitchens, this superb, roaster-fresh coffee is actually brewed for you. At the exact moment of fresh-brewed perfection, the water is removed—leaving the millions of miracle "Flavor Buds"!

100% pure coffee! You just add hot water—and the "Flavor Buds" flood your cup with coffee as rich and delicious as the best you've ever brewed! *Saves money, too!* The large economy size saves up to 75¢, compared to three pounds of ground coffee!

See how the Flavor Buds "come to life" in your cup!



Magnified view of miracle "Flavor Buds" as the instant hot water is added. See how "Buds" release famous Maxwell House flavor! This is coffee—as perfect as any you've ever tasted!

The only instant coffee with that GOOD-TO-THE-LAST-DROP flavor!

Look for the jar with the silver cap top!

MARCH, 1954

930

TYPICAL ADVERTISEMENT OF A HUNT FOODS PRODUCT IN *WOMAN'S DAY* AND SCHEDULE OF OTHER MAGAZINES IN WHICH IT APPEARED.

The advertisement appearing on the opposite page appeared in the April, 1955 issue of *Woman's Day* and is typical of the advertisements of Hunt Foods products that appeared at various times in *Woman's Day*. The identical advertisement appeared in other publications in the issues listed below (see Hunt Ex. 12).

Name of Publication	Issues
McCall's	September, 1955
Ebony	June, 1955; January, 1956
Redbook	April, 1955
Good Housekeeping	September, December, 1955
Better Living	August, 1955
Family Circle	April, 1955; January, 1956
Life	January 17, 1955
Everywoman's	April, 1955
The American Weekly	May 1, August 28, 1955
New York Herald Tribune	April 3, July 3, October 23, 1955
New York News	November 21, 1954; April 17, July 10, 1955; January 29, 1956
New York Times	February 13, July 17, September 18, 1955; January 15, 1956
New York Mirror	December 12, 1954; May 8, August 7, November 11, 1955
New Orleans Times Picayune	December 19, 1954; June 19, 1955
Newark News	March 27, June 19, October 9, 1955
Baltimore Sun	May 15, August 21, 1955
Washington Star	April 24, August 14, 1955
Indianapolis Star) Columbus Dispatch) Cincinnati Inquirer)	April 24, 1955
Seattle Times	April 17, August 14, November 9, 1955
St. Louis Globe Democrat	May 29, August 14, 1955
Minneapolis Tribune) Milwaukee Journal)	May 15, 1955
Des Moines Register)	October 24, 1954; August 14, 1955
St. Louis Post Dispatch	January 30, June 5, October 2, 1955
Boston Globe	March 13, June 5, September 18, 1955
Buffalo Courier Express) Syracuse Post Standard)	April 17, 1955
Detroit News	February 27, May 22, August 28, 1955
Chicago Tribune	August 14, 1955

Quick Stunts with Hunt's Tomato Sauce

10-Minute Pizza . . .

Delicious for Dinner...a Perfect Evening Snack

We've never seen it fail—

When you serve your friends these delicious little Hunt Pizzas, everybody raves about them—especially the men. And the women all want the recipe.

You'll find Hunt's Tomato Sauce exactly right for this quick and easy treat. It's all tomato—rich in flavor, seasoned and spiced deliciously.

And you'll see what a handy "flavor headstarter" Hunt's Tomato Sauce is to have in the pantry—for your stews, casseroles, meat loaf—dozens of your recipes.

Choose the Hunt red-label when you buy tomato sauce. Then, enjoy these little Hunt Pizzas with your family and friends.

Split four English muffins in half and toast in broiler. On each toasted half, make layers of the following:

A slice of cheese (Mozzarella is the real "pizza cheese" but you may use brick, Swiss or any good "melting" cheese)
One tbsp. Hunt's Tomato Sauce
One tbsp. salad oil
Salt and pepper (garlic salt optional)
A sprinkle of oregano (optional)
Sprinkle with grated cheese (Parmesan preferred)

Place on a cookie sheet in 450° oven for 5-10 minutes—till ingredients are hot and cheese melted. Makes 8 little Pizzas.

For variety, top with bits of Italian sausage, anchovies or sliced stuffed olives.

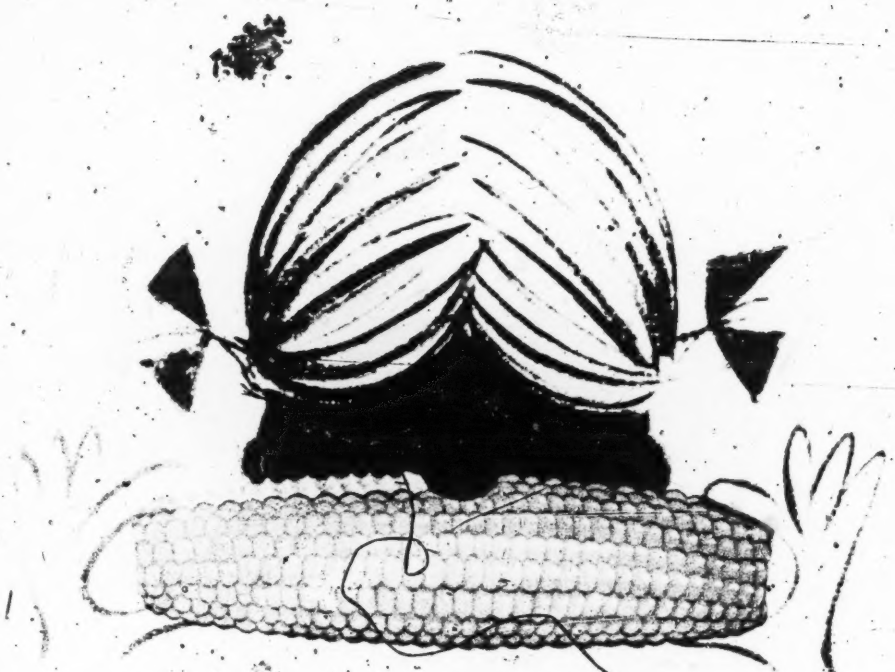
Hunt-
for the best

Headquarters! One on the back of every can of Hunt's Tomato Sauce—at your grocer's.
Hunt Foods, Inc.
Fullerton, California

TYPICAL ADVERTISEMENT OF A MORTON SALT PRODUCT IN *WOMAN'S DAY* AND SCHEDULE OF OTHER PUBLICATIONS IN WHICH IT APPEARED.

The advertisement appearing on the opposite page appeared in the July, 1956 issue of *Woman's Day* and is typical of the advertisements of Morton Salt products that appeared at various times in *Woman's Day*. The identical advertisement appeared in other magazines in the issues listed below (see Morton Exhibit 2).

Name of Publication	Issue
Woman's Day	July, 1956
Western Family	July, 1956
Household	July, 1956
Good Housekeeping	July, 1956
Life	July 23, 1956
Farm Journal and Country Gentleman	August, 1956
Everywoman's	August, 1956
Better Homes and Gardens	August, 1956
Ladies Home Journal	August, 1956
Family Circle	September, 1956
True Story	September, 1956
Sunset	September, 1956



m-m-m-m-m-m-m

another good reason for

When it rains it pours

P.S. Two new ways to salt corn, or anything else!

Morton Moisturets, 1¼ inches high, packed six to the tray.

Morton Sakura, 3¼ inches in size, sold in cartons of three.